



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kirkland Sales, Inc.

File: B-249090

Date: October 23, 1992

Mikel J. Bowers, Esq., Scott, Douglass & Luton, L.L.P., for the protester,
Darence L. Smith for Best Foam Fabricators, Inc., an interested party.
Adam C. Striegel, Esq., General Services Administration, for the agency,
Jeanne W. Isrin, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation provision which required bidders to furnish the percentage content of post consumer recovered material (PCRM) "being used for this procurement" could not reasonably be interpreted as requiring the percentage PCRM in the total material of the procurement where (1) applicable specifications required PCRM content in only one component of the procured items; (2) the provision specifically referred bidders to the specification requiring PCRM content for that component; and (3) there is no PCRM content requirement in the other component.

2. Bid was properly rejected as nonresponsive where solicitation required that a component of the required item contain at least 40 percent post consumer recovered material (PCRM) and bidder inserted "30" into blank space for percentage of PCRM used in the procurement; irrespective of provision elsewhere in the solicitation that, by signing its bid, protester was agreeing to comply with applicable requirements for the use of recovered materials, insertion of "30" in the space for percentage of PCRM content rendered bid ambiguous as to whether protester was agreeing to be bound by the 40-percent requirement, and thus nonresponsive.

DECISION

Kirkland Sales, Inc. protests the rejection of its low bid as nonresponsive for 22 line items, representing indefinite amounts of reusable cushioned shipping boxes of various sizes and shapes, and the award of a contract to Best Foam

Fabricators, Inc. for 15 of those items, under invitation for bids (IFB) No. 2FYS-AK-92-0001-S, issued by the General Services Administration (GSA).

We deny the protest.

The solicitation, which contemplated award of a requirements contract for the shipping boxes and other items, was issued on March 6, 1992. At the April 7 bid opening, Kirkland submitted the low bid on 22 items (out of 68 in the solicitation), all of which were for shipping boxes. These items consist of an outer fiberboard box and a polyurethane foam insert to cushion the box's contents. The solicitation required that the shipping boxes conform to Federal Specification (FS) PPP-B-1672C. That specification incorporates by reference FS PPP-B-000636L, which sets forth the requirements for the outer fiberboard boxes, and Military Specification (MS) MIL-P-26514, which contains the requirements for the foam inserts.

The fiberboard box specification (i.e., FS PPP-B-000636) requires at paragraph 3.7.1 that the supplier certify that the product supplied contains at least 40 percent post consumer recovered material (PCRM).¹ Page 83 of the solicitation contained the following provision:

"52.223-4 (APR. 1984)
RECOVERED MATERIAL CERTIFICATION:

The offeror certifies, by signing this offer, that recovered materials, as defined in Section 23.402 of the Federal Acquisition Regulation, will be used as required by the applicable specifications."

Attached to the front of the solicitation was a "Notice Concerning Solicitation," which contained the following provision:

"Our office is requesting that all bidders furnish the percentage content of post consumer recovered material being used for this procurement [emphasis added]. Therefore, you are required to fill in the aforementioned information under Section B, Page 17 of this solicitation. (For further

¹PCRM is defined in paragraph 6.5 as "paper, paperboard and fibrous wastes from factories, retail stores, official buildings, homes, etc. after they had passed through their end usage as a consumer item, including: used corrugated boxes; old newspapers; old magazines. . . ."

details, refer to paragraph 3.7.1 under Federal Specification PPP-B-000636L)."

Finally, page 17 of the IFB contained the following provision:

"APPLICABLE TO ITEMS 1-59 & 66-68: (the required shipping boxes)

IMPORTANT:

PLEASE FILL IN PERCENTAGE OF POST CONSUMER RECOVERED MATERIAL: _____ %."

The protester inserted "30" in the blank space for percentage of PCRM content in the page 17 provision. The contracting officer concluded that this constituted a representation by Kirkland that it intended to deviate from the 40-percent PCRM content requirement under paragraph 3.7.1 of the specifications governing the fiberboard box component, and thus rejected Kirkland's bid as nonresponsive. Award for 15 of the items was made to Best Foam on June 5. No award has been made for the remainder of the items pending resolution of the protest. Kirkland filed this protest with our Office on June 17. Performance of the contract has not been suspended because the protest was filed more than 10 days after award. Federal Acquisition Regulation (FAR) § 33.104(c).

Kirkland maintains that its bid was responsive to the 40-percent requirement since, by signing its bid it automatically agreed to the page 83 certification provision requiring use of PCRM as required by the applicable specifications; this was sufficient to bind the firm to meet the 40-percent PCRM requirement under the fiberboard box specification. Kirkland explains that it inserted the number "30" instead of "40" based on its reading of the Notice (quoted above) attached to the RFP, which asked bidders to specify the percentage of PCRM "being used for this procurement." Kirkland states that its fiberboard boxes do contain 40 percent PCRM, but that it read this language as requiring the percentage of all of the materials that would be PCRM, including the foam inserts; since the inserts have no PCRM, the total percentage for all the materials was reduced to 30 percent, and thus it inserted "30" in the page 17 provision. According to Kirkland, if GSA interprets the Notice provision as referring only to the outer fiberboard box, then the provision contains an ambiguity which misled Kirkland into submitting a noncompliant bid.

An ambiguity exists where two or more reasonable interpretations of a solicitation are possible. Delta Scientific Corp., B-233485, Nov. 23, 1988, 88-2 CPD ¶ 516. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a manner which gives effect to all its provisions. Herman Miller, Inc., 70 Comp. Gen. 287 (1991), 91-1 CPD ¶ 184.

We find that Kirkland's interpretation is not reasonable because it fails to give effect to all of the solicitation language. While the first sentence of the Notice language indeed referred to the material "being used for this procurement" without specific mention of the fiberboard box component, Kirkland's interpretation that the requested percentage therefore also included the non-PCRM foam inserts completely ignores the last sentence of the Notice. As quoted above, that sentence specifically referred bidders to FS PPP-B-000636L, paragraph 3.7.1, which sets forth the 40-percent PCRM content requirement for the fiberboard box component. The inclusion of the two sentences in the same paragraph suggested that they contained related information, and we think the parenthetical nature of the second sentence, together with its reference to "further details," reasonably should have indicated to Kirkland that it was intended to further define the preceding language as applying to the fiberboard box component. Under this interpretation, furthermore, it could be assumed that the agency wanted the exact percentage of PCRM in the fiberboard boxes; under Kirkland's interpretation, since the foam inserts contain no PCRM, the percentage asked for would serve no apparent purpose. We conclude that Kirkland should have known from all of the Notice language read together, and from the fact that the IFB did not address PCRM requirements for other than the fiberboard boxes, that the PCRM percentage requested applied only to the fiberboard box component. The IFB therefore was not ambiguous.

To be responsive, a bid must reflect an unequivocal offer to provide the exact item or service called for in the IFB so that acceptance of the bid will bind the contractor to perform strictly in accordance with the IFB's material terms and conditions. Biehn Constr., Inc., B-244364, Sept. 9, 1991, 91-2 CPD ¶ 231. Although by signing its bid Kirkland agreed to the page 83 certification provision, Kirkland's insertion of "30" in the page 17 provision rendered its bid ambiguous as to whether the firm was agreeing to the 40-percent requirement.² A bid that is ambiguous as to a

²Kirkland asserts that, if its bid is nonresponsive for failure to insert at least 40 percent in the blank, so too must be that of Best Foam, which left the space blank.

(continued...)

material provision, so that it is nonresponsive under one interpretation and responsive under the other, cannot be accepted. J.G.B. Enters., Inc., B-219317.2, July 31, 1985, 85-2 CPD ¶ 109. Kirkland's bid therefore properly was rejected as nonresponsive.

Kirkland argues that any deviation in its bid was a minor one, which it should have been allowed to correct. The deviation in Kirkland's bid was not minor; the defect was not a matter of form, but of substance--whether Kirkland was agreeing to furnish items that conformed to the specifications. See FAR § 14.405; Aluminum Co. of Am., supra. Moreover, a bid cannot be corrected under mistake in bid rules in order to make it responsive. See FAR § 14.406-3; Delta Scientific Corp., supra.


Kirkland states that rejecting its low bid as nonresponsive will unnecessarily cost the government money. However, the public interest in maintaining the integrity of the competitive bidding process outweighs any monetary benefit

²(...continued)

However, this argument is untimely raised in Kirkland's July 30 comments on the agency report, because the information upon which it is based was contained in a June 11 letter from GSA to Kirkland. Grounds for protest raised more than 10 working days after the basis for protest is known or should have been known are untimely and will not be heard. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1992); Unitor Ships Serv., Inc., B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110. In any case, GSA argues, and we agree, that Best Foam's failure to complete the page 17 provision did not render its bid nonresponsive. Completing such a requirement is necessary for a bid to be responsive only if the provision imposes requirements materially different from those to which the contractor is otherwise bound. Tennier Indus., Inc., B-239025, July 11, 1990, 90-2 CPD ¶ 25. By signing its bid, Best Foam certified that it would provide 40 percent PCRM content in its fiberboard box component, and its failure to complete the page 17 provision had no effect on that obligation. In contrast, although Kirkland also signed its bid, its insertion of "30" into the page 17 blank brought into question whether it was agreeing to adhere to the 40 percent requirement.

to be gained from waiving material bidding deficiencies,
Valley Constr. Co., Inc., B-243811, Aug. 7, 1991, 91-2 CPD
¶ 138; Aluminum Co. of Am., supra.

The protest is denied.


for James F. Hinchman
General Counsel